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Closing a Chapter of History: Germany's Right to Compensation for the Sudetenland

Charles A. Schiller*

Look after our houses, we are digging your graves. We will not piss with you, it is our homeland and our children's homeland." /s/ Fiery-Man Hans Joachim Keppke. Leaflets containing these words were found in the mailboxes of the citizens of Dubi, CSFR in September, 1992.¹

I. INTRODUCTION

Recently, a group of Germans who formerly lived in what is now the Czech and Slovak Federation (CSFR) have been pressing the German government to seek compensation from the CSFR² for land and personal property expropriated by Czechoslovakia at the end of World War II. This land was formerly inhabited and owned by Germans who were expelled at the end of World War II pursuant to the Potsdam Protocol.³ However, the conduct and agreements entered into by Germany and the CSFR beginning in 1919 to the present do not legally support the claim for compensation which the Sudeten Germans⁴ have passionately pleaded since the end of World War II. The conduct of Germany and the CSFR and the agreements concluded between the two countries since the end of World War II indicate otherwise. The Sudeten Germans who formerly lived in the regions of Bohemia and Moravia

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¹ *Czechoslovakia: The Love Germans Can Buy*, REUTER TEXTLINE GUARDIAN, Nov. 3, 1992, available in LEXIS, News Library, Txprim File.

² See Chris Bowlby, *Kohl Sets Seal on 'Invasion' of Czechoslovakia*, THE INDEPENDENT, Feb. 29, 1992, at 8.

³ See Protocol of the Proceedings of the Berlin Conference, Aug. 2, 1945, § XII, reprinted in JOHN W. WHEELER BENNETT & ANTHONY NICHOLS, *THE SEMBLANCE OF PEACE, THE POLITICAL SETTLEMENT AFTER THE SECOND WORLD WAR* 644 (1972) ("The three Governments, having considered the question in all its aspects, recognize that the transfer to Germany of German populations, or elements thereof, remaining in Poland, Czechoslovakia and Hungary, will have to be undertaken. They agree that any transfers that take place should be effected in an orderly and humane manner.").

⁴ See RADOMIR LUZA, *THE TRANSFER OF THE SUDETEN GERMANS* 2 n.6 (1964) (The term 'Sudeten Germans' was used frequently to designate German inhabitants of Bohemia and Moravia-Silesia during the Nazi era. Coined in 1902 by Franz Jesser, it appeared in an article in the Prague weekly, *Deutscher Volksbote*).

(referred to by Germans as the Sudetenland)⁵ and who were transferred out of Czechoslovakia at the end of World War II have no legal right to restitution or compensation for land and other property taken under the municipal law of Czechoslovakia.

The area of land from which the Sudeten Germans were expelled encompasses the historic provinces of Bohemia and Moravia which lie at a strategic point in Central Europe between Vienna and Dresden.⁶ Germans have settled outside the modern day borders of Germany throughout European history and have created unique political problems wherever they chose to settle. In contrast with, for example, the Flemish weavers or the French Protestants who went to England, Germans have refused to assimilate with indigenous European populations "on the general grounds that they were socially more advanced."⁷ Germans historically viewed Bohemia and Moravia as an ancient German land, in the same way they viewed Austria, Bavaria, and Saxony.⁸ Thus, even though the Slavic peoples in the region, namely the Czechs, were in the majority, they were viewed by the Germans as a minority in the wide area of Central Europe where German is spoken.⁹ The Czechs, on the other hand, view themselves as the Slavonic protectors of Central Europe.¹⁰

While the legality of the taking of foreign-owned property has been widely debated, particularly since the end of World War II,¹¹ there is an underlying assumption that a state may take foreign-owned property under traditional notions of territorial sovereignty.¹² Nevertheless, it has

⁵ See ELIZABETH WISKEMANN, *CZECHS AND GERMANS* 97 (1938) (Beginning in approximately 1910, Germans who inhabited the regions of Moravia and Bohemia, the wooded mountainous region of northern and western Czechoslovakia, tried to strengthen their unity through a common name. The mountains which form the eastern frontier of Bohemia, the Riesengebirge, Adlergebirge, and several other chains are collectively known as the Sudeten, hence the name Sudetenland and Sudeten Germans.).

⁶ See *id.* at 1.

⁷ *Id.*

⁸ See *id.* at 2.

⁹ See *id.*

¹⁰ See *id.*

¹¹ See D. W. GREIG, *INTERNATIONAL LAW* 575 (2d ed. 1976).

¹² See FIORE, *INTERNATIONAL LAW CODIFIED* 187 (1918) quoted in B.A. WORTLEY, *EXPROPRIATION IN INTERNATIONAL LAW* 12 (1959) ("[All real and personal property] actually in the territory of the State, considered in itself and independently of the persons to whom it belongs, must be deemed subject to the right of imperium of the territorial sovereign.").

Indeed under the Austinian notion of sovereignty, "the sovereign was *legibus solutus* [released from the laws; not bound by the laws. An expression applied in the Roman civil law to the emperor. See BLACK'S LAW DICTIONARY 899 (6th ed 1990)], and might lawfully enjoy property which it could control, on such terms as it desired." JOHN AUSTIN, *LECTURES ON JURISPRU-*

been argued that when a state expropriates¹³ foreign-owned property it only acquires title under its own national law. This title may, however, be invalid under international law and, indeed, may give the former owner a claim for restitution or compensation under international law.¹⁴

Deeply rooted in classical international law is the notion that sovereign states are the only proper subjects of the international legal order.¹⁵ A fundamental attribute of a sovereign state is the power to determine the rights and obligations of its own citizens through its municipal law.¹⁶ Towards this end, a principle function of municipal law is the regulation of citizenship.¹⁷ It should be noted, however, that the validity of an individual's citizenship with regard to a third party state as determined by municipal law may be tested by international law.¹⁸ Another fundamental attribute of municipal law that is interrelated to citizenship is the regulation of property rights. "A sovereign certainly

DENCE, 839 (5th ed. 1885).

¹³ See WORTLEY, *supra* note 12, at 1, 2 ("[Wortley defined] a normal expropriation [as one where] in accordance with the law of the *situs* of the thing taken, State power compels an owner to give up the indicia of title in accordance with the special forms which openly mark the character of the act. However much an owner may be treated with consideration in arbitral or other proceedings before the expropriation, he knows that by the legal system of the expropriating State he is bound to accept the State's . . . verdict for all purposes and in all circumstances.").

¹⁴ See *id.* at 15 (Municipal law determines whether a property right has been acquired and whether it is vested in the claimant. International law must decide whether the defendant state is liable for the violation of a property right so acquired, whether the claimant state is entitled to maintain the action in an international court, and finally the appropriate measure of damages.).

¹⁵ See HENRY J. STEINER AND DETLER F. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 244 (3d ed. 1991). See also 1945 I.C.J. Acts and Docs. 34 (establishing that only states are permitted to be parties before the court).

¹⁶ See *Blackmer v. United States*, 284 U.S. 421 (1932) (holding that jurisdiction over one's own nationals is one of the traditional sources of jurisdiction in international law).

¹⁷ See HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* (Robert M. Tucker ed., 2d ed., 1966) (stating that acquisition and loss of citizenship are regulated by the national legal order, which normally makes this status the condition of certain duties and rights). See also *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4, *reprinted in* STEINER & VAGTS, *supra* note 15, at 253 ("[N]ationality has its most immediate, its most far-reaching and, for most people, its only effects within the legal system of the state conferring it. Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the state.").

¹⁸ See *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4, *quoted in* Kelsen, *supra* note 17, at 374 (The court, while acknowledging that "it is for every sovereign State to settle by its own legislation the rules relating to the acquisition of its nationality," went on to declare that it is international law which determines whether a state is entitled to exercise diplomatic protection on behalf of an individual claimed as a national.).

regulates property in its territory and under its effective control."¹⁹

In order to understand why the Sudeten Germans were transferred out of Czechoslovakia at the end of World War II, it is necessary to look at the history of the Czech and German people and their long coexistence in Bohemia and Moravia. This Note will first provide an historical background and detail the tensions that have existed between the Czech and German peoples from the initial German migrations into Bohemia and Moravia during the twelfth century, to the rise of Nazism within Czechoslovakia under the auspices of the Henlein party, the signing of the Munich Agreement, and ultimately the expulsion of the Sudeten Germans from Czechoslovakia pursuant to the Potsdam Protocols. Analysis of the current status of the 1938 Munich Agreement in international law will show that the Munich Agreement is null and void because: 1) it was imposed on Czechoslovakia under threat of force; and 2) the Federal Republic has renounced all territorial claims covered under the Munich Agreement.

The sequence of the denationalization and confiscation decrees initially gave rise to a claim for damages on behalf of those Sudeten Germans whose property was taken pursuant to the October 25, 1945 confiscation decree. Notwithstanding claims for compensation or restitution which arose after the October 25, 1945 confiscation decree, this Note concludes that the Czech Republic owes no compensation or restitution under international legal principles of state succession, prescription, or historical consolidation.

II. HISTORICAL BACKGROUND

A. *The Czech-German Conflict: 400 A.D. to 1918*

When the state of Czechoslovakia was established at the end of World War I in 1918, the state was comprised of almost 15 million people of which approximately 3.2 million were of German ancestry.²⁰ The ethnic Germans in the new state of Czechoslovakia had lived in the regions of Bohemia and Moravia in the western and northern regions of Czechoslovakia since the twelfth century.²¹

Beginning in approximately the fifth century, A.D., Slavic tribes were pushed westward by the Avars into what is now Bohemia and Moravia.²² Between the sixth and the twelfth centuries, the inhabitants

¹⁹ WORTLEY, *supra* note 13, at 13.

²⁰ See LUZA, *supra* note 4, at 1 n.1 (quoting CZECHOSLOVAK STATE STATISTICAL OFFICE, ANNUAIRE STATISTIQUE DE LA REPUBLIQUE TCHECOSLOVAQUE (1934)).

²¹ See *id.* at 23.

²² See WISKEMANN, *supra* note 5, at 3.

of Bohemia and Moravia were almost exclusively Slavs.²³ Slavic rulers controlled not only Bohemia and Moravia,²⁴ but also parts of Slovakia, Silesia, Galicia, and Pannonia.²⁵ Early in the tenth century, Hungarians destroyed Moravia and overran western Slovakia.²⁶ The proximity of Bohemia and Moravia to the area of Central Europe principally inhabited by Germans, and what is now present-day Germany, led the Czechs to look to the Roman Catholic Church and the Catholic religion.²⁷ Since the days of Charlemagne, the Czechs acknowledged the suzerainty of the Holy Roman Emperor.²⁸ Most of the clergy of the Roman Catholic Church in Bohemia and Moravia were German and through the clergy, German influences began to spread in the region.²⁹ At the same time, Prague began to flourish as a marketplace and center of commerce which, in turn, attracted German merchants.³⁰ In the twelfth and thirteenth centuries, Germans began to migrate to Bohemia in significant numbers.

While life was better for the Czechs under Charles IV, the Czechs were irritated by the immigrants who made no attempt to learn the Czech language.³¹ Furthermore, as the towns developed, the Germans grew wealthier and the clergy remained German.³² The poorer Czechs grew increasingly resentful and thirty years after Charles IV died, the Hussite revolution followed.³³ To the Czechs the Hussite Revolution represented an "heroic uprising in the interests of religious truth, and a return to simplicity and social equality."³⁴ The Germans, on the other

²³ See *id.*

²⁴ See LUZA, *supra* note 4, at 2. Bohemia and Moravia are located in what is now the northern, western, and southern regions of the Czech Republic, contiguous with Germany. *Id.*

²⁵ See *id.*

²⁶ See *id.*

²⁷ See *id.*

²⁸ See *id.*

²⁹ See *id.* at 4.

³⁰ See *id.*

³¹ See *id.* at 7.

³² See *id.* See generally JOSEF CHMELAR, *THE GERMAN PROBLEM IN CZECHOSLOVAKIA* (1936).

³³ See WISKEMANN *supra* note 5, at 7.

³⁴ *Id.* at 8. The Hussite revolution was a revolt led by Jan Huss who was a Bohemian religious reformer and martyr who lived from 1369-1415. Huss attacked the Catholic church's interference in political matters and called for an end to papal greed and priestly corruption. Huss' movement to reform the church gradually evolved into a revolt against German clergy and burghers who wielded great influence in Bohemia. He was burned at the stake for heresy and in the wake of his death a wave of violent revolt swept over Bohemia led by Huss' followers — later known as Hussites. Ultimately, the Hussite Revolt inspired Martin Luther. The Hussite wars brought a rapid halt to the stream of Germans who had been settling in Bohemia and Moravia

hand, viewed the Hussite Revolution as "an outburst of destructive brutality, typical of the Slav races."³⁵

Beginning in the sixteenth century, the Habsburgs began to increasingly Germanize the Czechs in the region, particularly the Czech nobility.³⁶ At the beginning of the seventeenth century, the Bohemian nobility of Czech descent sought to stem the Germanization of the region imposed by the Habsburgs.³⁷ In 1620, the Bohemian nobility suffered a horrendous defeat at the famous Battle of the White Mountain, outside Prague.³⁸ The defeat at White Mountain has taken on mythical significance as a symbol of the oppression of the Czech people by ruthless Germans.³⁹ The Czech defeat at White Mountain in 1620 effectively marked the end of Czech independence for over 300 years. German became the second official language in the region and the Protestant Czech middle class and aristocracy were driven out of Bohemia. Thereafter, Germans began to immigrate back into the region in such great numbers that by the eighteenth century German had practically become the official language in Bohemia and Moravia as the Czech people came under the suzerainty of the Habsburg Monarchy.⁴⁰

The period of the Habsburg reign over the Czech people from the end of the eighteenth century to the middle of the nineteenth century brought the Czech-German problem into sharp focus. It was during this period that Czech-German relations began to show the strains which have characterized their relationship in the twentieth century. "[I]n the conflicts and impacts of the years around 1800, the modern consciousness of both the Germans and the Czechs was born."⁴¹ Out of the Age of Enlightenment came the ideas of Romanticism which flowed from the pens of German and Bohemian German writers and gave a sense of value and importance to the individual which greatly affected the Czechs.⁴²

since the twelfth century. The flow of German immigrants, however, resumed before the end of the fifteenth century. *Id.*

³⁵ See *id.* at 8.

³⁶ See *id.* at 9.

³⁷ See *id.*

³⁸ See LUZA, *supra* note 4, at 23. See also WISKEMANN, *supra* note 5, at 10 (At the Battle of White Mountain, the Czech nobility, which strongly opposed and resisted the Germanization of Bohemia, was crushed by the forces of the Habsburgs.).

³⁹ See WISKEMANN, *supra* note 5, at 10.

⁴⁰ See LUZA, *supra* note 4, at 23; WISKEMANN, *supra* note 5, at 10 (discussing that Czech increasingly became the language of peasants and laborers).

⁴¹ WISKEMANN, *supra* note 5, at 14.

⁴² See *id.* (The ideas and writings of the Enlightenment and Romanticism heightened the Czechs' awareness of their culture, language, and traditions.).

The Czechs began to discover and revive medieval literature in their native tongue which had seemingly been lost under the relentless drive to Germanize the whole historical homeland of the Czechs in Bohemia and Moravia.⁴³ In fact, Mozart's *Don Giovanni* whose first performance was in Prague in 1787, was performed in Czech in 1825 — despite more than half of the program being in German.⁴⁴

In 1848, revolution, which had consumed France almost fifty years earlier, swept across Europe to Austria.⁴⁵ Joseph II, the reigning Habsburg monarch, emancipated the peasants in Austria.⁴⁶ Liberty and equality which were the ideals of the 1848 Revolution were soon swallowed up by a force that has always exerted tremendous pressure on Europe and continues to do so today: nationalism. The Czechs of the historic provinces of Bohemia, Moravia, and Silesia found themselves between two powerful competing blocs. On the one hand, were the Czechs to become part of a greater Germany which included Austria they would immediately become a small minority. On the other hand, a democracy within the frontiers of Austria alone would render the Czechs part of a Slavic majority.⁴⁷ The Czechs in Bohemia and Moravia fell under the rule of Francis Joseph of Austria.

The Czechs again found themselves at the mercy of the Germans when the Schmerling Constitution⁴⁸ was approved under which Austria shared control of the historic provinces with a German oligarchy.⁴⁹ One of the principal features of this Constitution which angered the Czechs was the disproportionate voting scheme which favored the Germans.⁵⁰ The constitutional allocation of power caused immense friction between Germans and Czechs in Bohemia.

During the period between 1871 leading up to World War I, the economic, cultural, and particularly the linguistic influence of the German populations in Bohemia and Moravia grew steadily. German industrialists increasingly controlled the factories which employed substantial

⁴³ See *id.*

⁴⁴ See *id.* at 15.

⁴⁵ See *id.* at 21.

⁴⁶ See *id.* at 20.

⁴⁷ See *id.* at 21.

⁴⁸ Under the Schmerling Constitution, named for its drafter, the towns, the chambers of commerce, and the landowners, all having a very high proportion of Germans were permitted to elect representatives to the Bohemian Diet disproportionate to their number in the general population. The Schmerling Constitution's weighted voting scheme in favor of Germans gave them one representative to the Bohemian Diet for every 11,666 inhabitants, while the country districts, predominantly Czech, got one representative for every 49,081 inhabitants. See *id.* at 29-30.

⁴⁹ See *id.* at 30.

⁵⁰ See *id.*

numbers of Czech laborers. One of the sharpest points of contention between the Czechs and Germans of Bohemia and Moravia involved language. Czechs had always demanded that judicial and administrative personnel in Bohemia be bilingual.⁵¹ Germans felt that being forced to speak Czech was degrading and strongly resisted this demand.⁵² The fierceness of German resistance to any accommodation which provided a measure of bilingualism further embittered the Czechs who were forced to be bilingual owing to the German control of large sectors of the economy. Tensions continued up until World War II and were manifested in numerous ways. The Germans and the Czechs formed their own national societies dedicated to advancing the nationalist agendas of both peoples.⁵³ Tensions between the Sudeten Germans and the Czechs had serious repercussions for university life.⁵⁴ Germans simply refused to learn Czech and considered the language and culture inferior to German.⁵⁵

With the outbreak of World War I, the Czechs found themselves in the unenviable position of fighting on the side of the Germans who had oppressed them for so long. During the war itself, Thomas Masaryk, Durich Stefanik and Eduard Benes relentlessly championed the establishment of a Czechoslovak state from exile in Paris.⁵⁶ The work of these leading Czech exiles was rewarded on January 10, 1917, when President Woodrow Wilson issued a statement setting forth the war aims of the Allies.⁵⁷ Finally, on October 28, 1918, the Prague National Committee, after securing the approval of the Austrian military authorities,

⁵¹ See *id.* at 37.

⁵² See *id.* at 38.

⁵³ See WISKEMANN, *supra* note 5, at 54-55 (German societies such as the Schulverein and Bund der Deutschen advocated the Germanization of Bohemia, while Czech societies such as the Sokol and Ustredni Matice Skolska advocated Czech nationalist aspirations in Bohemia.).

⁵⁴ In 1882, Prague University was split into German and Czech sections. See *id.* at 40. Czechs wanted to build a new national university in Brunn/Brno, the capital of Moravia, however Germans were opposed to any new universities in principle. See *id.* at 63-64. Brno's population was 72.4% Czech and 27.6% German and was surrounded by Czech suburbs, had no Czech councilmen, and had street signs all in German. See *id.* Germans suggested a smaller town such as Kremsier/Kromeriz, or Olmutz/Olomouc for this new university. See *id.* at 64.

In 1881, the German theaters were built by princes or the Austrian State, while Prague Theater was build with 80% private funds and the remainder out of taxes from Kingdom of Bohemia. See *id.* at 64.

⁵⁵ See *id.* at 59-60.

⁵⁶ See Victor S. Mamatey, *The Establishment of the Republic*, in A HISTORY OF THE CZECHOSLOVAK REPUBLIC 1918-1948 14 (Victor S. Mamatey & Radomir Luza eds., 1973).

⁵⁷ See *id.* at 15 (The statement provided, in part, that one of the allied objectives was "the liberation of Italians, of Slavs, of Roumanians and of Czechoslovaks from foreign domination.").

issued its first law proclaiming the independence of Czechoslovakia.⁵⁸

At the end of World War I, Czechs occupied the historic provinces, and Germans protested strongly. In fact, on November 22, 1918, the Vienna National Assembly passed a law formally incorporating the Sudeten German areas into German-Austria.⁵⁹ The German-Austrian government which has just proposed that it be joined to Germany, also protested the Czechoslovak occupation of the Sudeten German areas and pressed for allied arbitration of the conflict.⁶⁰ Benes, who had just returned from exile in Paris sought the assistance of France.⁶¹ France, having just fought its bloodiest war to date with Germany, was determined to see that Germany not gain any territory after the war.⁶² Consequently, without consulting Britain or the United States, the French Foreign Minister responded to Vienna's plea for arbitration and that "Czechoslovakia had been recognized as an allied nation and that, 'at least until the decision of the Peace Conference,' she should have the boundaries of the historic provinces of Bohemia, Moravia and Austrian Silesia."⁶³ Britain and the United States went along with the French decision with the proviso that a final decision would be made at the Paris Peace Conference. At the Paris Conference, which began on January 18, 1919, the Allies recognized the independent state of Czechoslovakia which was to embrace provinces of Bohemia, Moravia, and Silesia — a territory which included over three million Sudeten Germans.⁶⁴

B. The Czech German Conflict: 1918-1938

The period from 1918-1938 was decisive and would have a profound effect upon the course of Czech-German relations for the rest of the twentieth century. Konrad Henlein⁶⁵ became the leader of the Sudeten German Party in Czechoslovakia. Under his leadership, many of the strongly nationalistic German groups in Czechoslovakia were united under the banner of the Sudeten German Party. Henlein ultimately allied the Sudeten German Party with the Third Reich. Furthermore, the active participation and acquiescence of the Sudeten Germans in Nazi atrocities committed against the Czech people was one of the principle reasons the denationalization and confiscation decrees were issued by the Benes

⁵⁸ See *id.* at 26.

⁵⁹ See *id.* at 29.

⁶⁰ See *id.*

⁶¹ See *id.*

⁶² See *id.*

⁶³ See *id.* at 30 (quoting Eduard Benes, II SVETOVA VALKA 499-501).

⁶⁴ See *id.*

⁶⁵ See LUZA, *supra* note 4, at 66 n.19 (Henlein was born near Liberec in 1898.).

government in 1945.

On February 28, 1992, Germany and the CSFR signed a Treaty on Neighborliness and Friendship in Prague.⁶⁶ The treaty covers a wider range of social, economic, and political issues, but leaves open some of the thorniest issues dating back to the end of World War II.⁶⁷ Among those questions which the German government still considers open are issues relating to the return and restitution of property in the CSFR formerly occupied by the Sudeten Germans.⁶⁸ The Sudeten German organization known as the Sudetendeutsche Landsmannschaft⁶⁹ (hereinafter the "SL") has gone further than the German government and has "demand[ed] the return of confiscated property in their former homeland of Bohemia and Moravia or in the alternative, compensation for that property. The SL has also called for direct talks with Czechoslovak or Czech authorities on these issues, which were not included in the Czechoslovak-German Treaty.⁷⁰ Many in the SL maintain that the Munich Agreement signed in 1938 is still valid⁷¹ and this, in turn, has stirred tremendous fear and apprehension among the Czechs, particularly in light of the fact that no mention of the Munich Agreement is made in the 1992 Friendship Treaty.⁷² These are currently issues which are emotionally charged for both Czechs and Germans and that have been highly politicized since the end of World War II, and in particular since the reunification of Germany. Nevertheless, as politicized as the issues have become, they are not solely political questions: they all have legal foundations, ramifications, and solutions.

III. THE 1938 MUNICH AGREEMENT

The 1938 Munich Agreement whereby Czechoslovakia ceded the Sudetenland is invalid under international law.⁷³ An examination of the

⁶⁶ See Treaty on Neighborliness and Friendship, Feb. 28, 1992, Germ.-CSFR.

⁶⁷ See *id.*

⁶⁸ Bowlby, *supra* note 2, at 11 ("Chancellor Kohl admitted that the treaty which covers a wide range of economic and political co-operation, leaves some 'open questions.' He said that the wrong done to the Sudeten Germans expelled from Czechoslovakia after the Second World War could not be forgotten . . .").

⁶⁹ See LUZA, *supra* note 4, at 313. The Sudeten German National Union (Sudetendeutsche Landsmannschaft), which was organized in 1945, maintains that the Munich Agreement is still valid. *Id.*

⁷⁰ See *New Talks on Sudeten German Issues Will be Necessary-Spokesman*, CTK National News Wire, Sept. 1, 1992, available in LEXIS, News Library, Curnws File.

⁷¹ "The Germans still maintain the validity of the Munich Agreement under international law and say that to declare it invalid now would cause enormous legal difficulties." Bowlby, *supra* note 2.

⁷² See *id.*

⁷³ See Paul J. Edwards, *The Trend of Law in Czechoslovakia*, 1947 WIS. L. REV. 654, 658

conditions under which the treaty was signed and the subsequent actions of the German government will attest to its invalidity. Nevertheless, many Germans, particularly those who comprise the SL, steadfastly maintain that the Munich Agreement is still valid under international law.⁷⁴ If in fact the Munich agreement were still valid, Germany would still have a legal claim to a substantial portion of the territory controlled by Czechoslovakia between 1919 and 1938 and which the CSFR now occupies and has occupied since World War II. The arguments of those who maintain the validity of the Munich Agreement echo the lines of *Mein Kampf* and rest on the proposition that the Agreement was validly entered into and that the Sudetenland is an historic part of Germany.⁷⁵ Furthermore, many in the CSFR are extremely upset that the 1992 Friendship Treaty does not expressly declare the Munich Agreement null and void *ab initio*.⁷⁶ It is the position of the German government that the Munich Agreement was valid under international law when signed and to declare it invalid now would create enormous legal difficulties.⁷⁷ At any rate, the failure to mention the Munich Agreement in the 1992 Friendship Treaty is, on the one hand, a point of hope and optimism for some Germans and, on the other hand, a point of fear and angst for Czechs and, thus, it is worthwhile to examine the 1938 Munich Agreement and its current validity in international law.

The Munich Agreement was signed on September 29, 1938 in Munich by Adolf Hitler, Neville Chamberlain, Edouard Daladier, and Benito Mussolini and is now considered by many states, although not by all, and not by Germany, to be invalid.⁷⁸ The tractional rule of the eighteenth, nineteenth, and the early part of the twentieth century regard-

(1947) ("The Munich surrender of September 29, 1938, and the Vienna award of November 7, 1938, hacked from Czechoslovakia 41,266 square miles of territory [predominantly in the northern parts of Bohemia and Moravia], 4,700 towns and villages, 5,344,000 inhabitants — one-third of its population. Of the people annexed by Germany, Hungary, and Poland 1,189,000 were Czechs and Slovaks, who of course, lost their press, their schools, their political rights, their cultural life and most of them, their occupations. There was no gain to anyone but the Germans, for the Nazis later swallowed Poland and Hungary also.").

⁷⁴ See LUZA, *supra* note 4, at 89.

⁷⁵ See ROBERT KEE, *MUNICH: THE ELEVENTH HOUR* 29 (1988). "Expansion of German living space eastwards and the national unity of all Germans in a new Reich were the proclaimed ideals [of *Mein Kampf*]." *Id.* See generally ADOLPH HITLER, *MEIN KAMPF* (1939).

⁷⁶ See Bowlby, *supra* note 2.

⁷⁷ See *id.* See also STUART S. MALAWER, *IMPOSED TREATIES AND INTERNATIONAL LAW* 101 (1977) (The legal difficulties center around marriages and property issues of Sudeten Germans in the living in the Sudetenland who became Reich citizens after the cession of the Sudetenland to Germany in 1938.).

⁷⁸ See KEE, *supra* note 75, at 215 (discussing the text of the Agreement). See also MALAWER, *supra* note 77, at 101.

ing imposed treaties was that the repudiation of treaties brought about through the threat or use of military force was unlawful under international treaty law.⁷⁹ Although there was no established treaty law with respect to the invalidity of treaties brought about through the use or threat of force, in 1938 international law was beginning to disfavor this procedure as is evidenced by Article I of the Hague Conventions of 1899 and 1907.⁸⁰ Additionally, Article 19 of the League of Nations Covenant provided that members could reconsider adhering to treaties whose observance might cause global instability.⁸¹ Although Article 19 did not refer to imposed treaties on its face, that was the intention of its drafters.⁸² Article 19 of the League of Nations Covenant represented a significant step in the development of treaty law with respect to imposed treaties. Furthermore during the inter-war period, influential writers began to recognize that a change in treaty law was occurring. Thus, in 1937, Hersch Lauterpacht stated that the "prior law [which held the repudiation of treaties imposed by force or threat of force unlawful] was obnoxious to some general principle of law, presumably one requiring the consent of states, but was nevertheless existing law."⁸³ Accordingly, by the time the Munich Agreement was signed in 1938, the law regarding the validity of imposed treaties was increasingly unsettled.

State practice during the inter-war period provides examples that nations also increasingly called into question the legitimacy of imposed treaties.⁸⁴ Perhaps the finest and most ironic example of this new state

⁷⁹ See 1 L. OPPENHEIM, *INTERNATIONAL LAW* 525 (1905); 1 L. OPPENHEIM, *INTERNATIONAL LAW* 547 (1912). See generally MALAWER, *supra* note 77.

⁸⁰ Hague Convention of 1899 and 1907, Article I, *reprinted in* MALAWER, *supra* note 77, at 41. "With a view to obviating, as far as possible, recourse to force in the relations between states, the Signatory [Contracting] Powers agree to use their best efforts to insure the pacific settlement of international differences." *Id.*

⁸¹ "The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable, and the consideration of international conditions whose continuance might endanger the peace of the world." GRACE E. ROADS, JR., *AMENDMENTS OF THE COVENANT OF THE LEAGUE OF NATIONS ADOPTED AND PROPOSED* 158 (1935).

⁸² See MALAWER, *supra* note 77, at 42. The intention of the drafters of Article 19 was that it be directly linked to Article 10 of the Covenant which provided in part that "[d]isputes will no longer be settled by a unilateral pronouncement of the most powerful party by means of pressure or violence, but in accordance with the Charter of the League." *Id.* As it turned out, there was no direct connection between Articles 10 and 19 in the final text of the covenant. As the text of the final draft indicates, the League had only an advisory role with respect to treaties imposed by force. See *id.* at 42-44.

⁸³ MALAWER, *supra* note 77, at 25.

⁸⁴ See generally MALAWER, *supra* note 77, at 25. See also Treaty Respecting the Province of Shantung, May 25, 1915, P.R.C.-Japan, 10 BRIT. FOR. ST. PAPERS 791; Treaty Respecting South Manchuria and Eastern Inner Mongolia, May 25, 1915, P.R.C.-Japan, 110 BRIT. FOR. ST. PAPERS 796 (The United States refused to recognize either P.R.C.-Japan treaty.); Armistice Con-

practice of questioning the legitimacy of imposed treaties involved Germany. From the outset of the negotiations over the Treaty of Versailles in 1919, Germany firmly believed that the treaty violated its sovereignty.⁸⁵ Although Germany did not consider the treaty invalid at its inception in 1919, it finally repudiated the treaty in 1936. Germany did not consider the treaty to be a violation of international law *per se*, but rather a violation of the conditions under which Germany entered the 1918 Armistice.⁸⁶ When Hitler repudiated the treaty in 1936, he further expanded the German legal objections to the Treaty of Versailles by adding that the treaty was imposed and dictated and, therefore, invalid.⁸⁷

Applying the same objections raised by the United States, the U.S.S.R., and Germany with respect to the imposition of treaties, one can also conclude that the Munich Agreement was invalid under the emerging custom of the inter-war period. Events leading up to the signing of the Munich agreement show a pattern of coercive pressure and acts which clearly illustrate what lay in store for Europe if the agreement was not signed.⁸⁸ The rise of a fiercely nationalistic pan-German party in Czechoslovakia under the leadership of Konrad Henlein paralleled the rise of National Socialism in Germany. National Socialism in Germany reawakened all of the seething prejudices which the Germans had developed towards the Slavs during their nearly seven-hundred-year coexistence. Concurrently, numerous German societies which had sprung to life in Bohemia grew increasingly vocal and nationalistic, all the while receiving financial assistance from the Nazis.⁸⁹ At the May 19,

cluded at Brest-Litovsk, Dec. 15, 1917, F.R.G.-U.S.S.R., 2 DOCUMENTS IN PREPARATION FOR PARIS PEACE CONFERENCE 1 (The U.S.S.R. signed the treaty, but believed it to be an imposed agreement and therefore of questionable legitimacy.).

⁸⁵ See 6 FOR. REL. U.S. 795 (1919) (discussing the observations of the German Delegation on the Conditions of Peace).

⁸⁶ See *id.* at 803.

⁸⁷ See MALAWER, *supra* note 77, at 30 (citing ADOLF HITLER, Speech to the German Reichstag, Mar. 7, 1936, in 319 INT'L CONCIL. 165-66, 176 (1936) (repudiating the Versailles Treaty and the Locarno Pact)).

⁸⁸ See MAMATEY, *supra* note 56, at 242. "Speaking on February 20, 1938, Hitler pledged protection for 'those fellow Germans who live beyond our frontiers and are unable to insure for themselves the right to a general freedom, personal, political, and ideological.' If the Sudeten troubles were not solved, he hinted at the use of force. The *Anschluss* [of Austria] on March 11, 1938, gave his words frightening meaning." *Id.* (quoting THE SPEECHES OF ADOLF HITLER, APRIL 1922-AUGUST 1939 1404-06 (Norman Baynes ed., 1942)).

⁸⁹ LUZA, *supra* note 4, at 50-51, 54, 59 (Groups including the Deutscher Schutzbund (The German Protection League), the Deutscher Kulturverband, the Sudetendeutscher Heimatbund (Sudeten German Home League), and the Bund Deutscher Osten all sprung up across Central and Eastern Europe after World War I, and advocated the unification of all German-speaking

1935 elections, the SDP received over sixty percent of the German vote in the country.⁹⁰ The link to the Nazis by Henlein and the SDP grew even stronger by 1937.⁹¹ Under Henlein's direction, and with the backing of the Third Reich, the SDP instigated several incidents of unrest in order to propagandize Czech oppression towards Sudeten Germans.⁹² Hitler had made plans to invade Czechoslovakia and Austria as early as 1937 to strengthen Germany's eastern flank.⁹³ The Anschluss of Austria occurred in March of 1938. And during the month of September, 1938, the German army massed on the Czechoslovak border.⁹⁴ It had been clear, beginning in 1937, that Britain and France would do nothing to jeopardize peace in Europe.⁹⁵ On September 29, 1938, The Munich Four Power Agreement was signed without Czechoslovakia's participation. Czechoslovakia abided by the decision on September 30, 1938, in the following statement by Foreign Minister Kamil Krofta:

The President and the Government submit to the conditions of the Munich Agreement which has come into being without Czechoslovakia and against her.⁹⁶

If the Treaty of Versailles was imposed on and dictated to Germany by the Allies, then there can be no disagreement that the Munich Agreement was also entered into under the threat of force, as indicated by the circumstances under which the Munich Agreement was signed, and by the language of the treaty itself. The Munich Agreement is a clear dictation of terms.⁹⁷ Several of the articles state that "evacuation will begin," and "remaining territory [will] be occupied by German troops."⁹⁸ The language of the treaty itself is much more representative of one party imposing its will on another as opposed to most treaties where the parties mutual intent to be bound is reflected in more cooper-

peoples into a Greater Germany.).

⁹⁰ See *id.* at 79-80.

⁹¹ See *id.* at 104 (In 1937 while in Stuttgart, Henlein said that "the happiness and future of the Sudeten Germans, as well as of all Germans in the world, are closely linked with those of the Third Reich, . . . and we have the inalienable right to unite ourselves on the basis of blood with our German brethren and to form one great national family.").

⁹² See *id.* at 103.

⁹³ See *id.* at 110. See also MALAWER, *supra* note 77, at 41 ("A secret German memo clearly indicated that Hitler had threatened the British and French Foreign ministers that military force would be used against Czechoslovakia if the Agreement were not concluded.").

⁹⁴ See LUZA, *supra* note 4, at 147.

⁹⁵ See *id.* at 110.

⁹⁶ *Id.* at 150.

⁹⁷ See MALAWER, *supra* note 77, at 40 (reviewing the text of the Munich Agreement).

⁹⁸ *Id.*

ative language.

Were a situation similar to the Munich Agreement to occur today, there is no doubt that it would be invalid under the Vienna Convention of the Law of Treaties. The Vienna Convention codified the emerging principle that treaties entered into under the threat or use of force are invalid.⁹⁹ Notwithstanding the absence of any codified international law concerning imposed treaties such as the Munich Agreement, numerous domestic courts, particularly in Europe, were called upon to settle property, probate, and citizenship claims owing to the great number of Europeans uprooted from their homes in the wake of World War II. Many European courts construed the Munich Agreement as invalid under international law.¹⁰⁰

Further evidence that the Munich Agreement was entered into under threat of force, and is therefore invalid, is that subsequent actions of the Germans violated the express terms of the agreement. Germany and Italy agreed that "[w]hen the question of the Polish and Hungarian minorities in Czechoslovakia has been settled, Germany and Italy, for their part, will give a guarantee to Czechoslovakia [guaranteeing the new boundaries of the Czechoslovak state] against unprovoked aggression."¹⁰¹ It was further declared that if the question of the Polish and Hungarian minorities in Czechoslovakia was not settled within three months, this question "shall form the subject of another meeting of the Heads of the Governments of the four Powers here present."¹⁰² On November 2, 1938, Germany and Italy approved the Vienna Award, thereby settling the Hungarian and Polish minority questions without reference to, or conference with, Britain or France, thereby violating the plain language

⁹⁹ The Vienna Convention on the Law of Treaties, Article 52, states: "[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations." See also U.N. Charter, art. 2, ¶ 4.

¹⁰⁰ See MALAWER, *supra* note 77, at 152-54. See also *Nederlands Beheers-Instituut v. Nimwegen and Männer*, 18 I.L.R. 249, 250-51 (Rb. Arnhem 1952), *rev'd*, 18 I.L.R. 251 (Hof Arnhem 1952) (holding that the 1938 Munich Agreement was void because of threat of aggression); *Ratz-Lienert and Klein v. Nederlands Beheers-Instituut*, 24 I.L.R. 536, 538 (H.R. 1955) (holding that both the Munich and Berlin Agreements [German citizenship treaty] were "concluded by Czechoslovakia under dear, inescapable and unlawful duress"); *Amato Narodni Podnik v. Julius Keilwerth Musikinstrumentenfabrik*, 24 I.L.R. 435, 437 (D.C. The Hague 1956) (holding that the Munich and Berlin Agreements were concluded under clear and unlawful duress and were therefore invalid); *Land Registry of Waldsassen v. Town of Eger (Cheb) and Waldsassen*, 44 I.L.R. 50, 55 (V.G.H. Bayern 1965) (holding that the Munich Agreement was either void *ab initio* because of illegal duress or it was valid when signed but rendered invalid after the forcible incorporation of Czechoslovakia into Germany in 1939).

¹⁰¹ See KEE, *supra* note 75, at 216.

¹⁰² See *id.*

of the Declaration attached to the Munich Agreement.¹⁰³ Then on March 15, 1939, Germany invaded Czechoslovakia and the next day Hitler proclaimed that "Czechoslovakia has ceased to exist" and that henceforth, it would be a Protectorate of the German Reich in which the Reichsprotektor in Bohemia and Moravia "had the task of carrying out the policies laid down by the Fuhrer."¹⁰⁴ The actions and statements of Germany itself were material breaches of the express language of the Agreement which permitted the signatories to terminate their obligations under the Munich Agreement.¹⁰⁵ Since its signing, all four signatories to the Munich Agreement have since repudiated it. Germany, however, has only done so to a limited extent.¹⁰⁶

At the conclusion of World War II, the Czechoslovak state was reconstituted within its pre-Munich borders with the approval of the United States, Britain, France, and the U.S.S.R.¹⁰⁷ However, no mention is made of the Munich frontiers in the Potsdam Protocol of August 2, 1945, for the reason that three of the four original signatories had already repudiated it and no German government existed at the moment.¹⁰⁸ When it became clear to the allies and to Germany that a formal peace treaty would not be concluded for some time, successive Chancellors of the Federal Republic of Germany announced their repudiation of the agreement in order to assuage Czechoslovak fears that Germany still considered all aspects of the Munich Agreement valid.¹⁰⁹ Finally, in the 1973 German (Federal Republic)-Czechoslovakian Treaty,

¹⁰³ MAMATEY, *supra* note 56, at 258-60 (The Vienna Award pushed the eastern border of Czechoslovakia northward depriving Czechoslovakia of 4,570 square miles of territory and 972,092 inhabitants, of whom 53% were Hungarians. Poland acquired two districts and 227,000 inhabitants, of whom 35% were Poles and 56% were Czechs. Moreover, Czechoslovakia lost eight coal mines, which accounted for 45% of Czechoslovakia's total coal production.).

¹⁰⁴ Edwards, *supra* note 73, at 659 (quoting Decree of the Fuhrer and Reichs Chancellor, March 16, 1939, published in 75 COLLECTION OF LAWS AND DECREES 485).

¹⁰⁵ See GREIG, *supra* note 11, at 499 (citing Tacna-Arica (Chile v. Peru), 2 U.N.R.I.A.A. 921 (1922)) (holding that a material breach of an international agreement is cause for the non-breaching party to unilaterally terminate obligations under the agreement).

¹⁰⁶ On the second anniversary of the signing, September 30, 1940, Winston Churchill announced that the agreement had been destroyed by the Germans. General De Gaulle declared on September 29, 1942, that France considered the Munich Agreement to be null and void. On September 26, 1944, Ivanoe Bonomi, representing the Italian government also declared the Munich Agreement null and void. See JOHN WHEELER BENNETT & ANTHONY NICHOLLS, THE SEMBLANCE OF PEACE 611-12 (1972).

¹⁰⁷ See *id.*

¹⁰⁸ *Id.*

¹⁰⁹ See *id.* Dr. Ludwig Erhard, Chancellor of the Federal Republic of Germany declared on October 15, 1964, that under no circumstances would Germany make any territorial claims on Czechoslovakia. Dr. Kurt Kiesinger announced on July 5, 1968, that "the Munich Agreement no longer exists." See *id.*

the Munich Agreement of 1938 "was declared void on the grounds that it had been imposed by force."¹¹⁰ Germany's only remaining reservation regarding the repudiation of the 1938 Munich Agreement may be found in Article I of the 1973 Treaty which states:

The Federal Republic of Germany and the Czechoslovak Socialist Republic, under the present Treaty, deem the Munich Agreement of 29 September 1938 void with regard to *their mutual relations* (emphasis added).¹¹¹

The language "with regard to their mutual relations" preserves the legal validity of civil acts contracted for under German law in the Sudetenland during the period 1938-1945, while simultaneously repudiating all aspects of the Munich Agreement which apply to the foreign relations between Germany and Czechoslovakia.¹¹² While, on the one hand, it is understandable that the failure to mention the Munich Agreement in the 1992 Friendship Treaty between the two countries has caused tremendous anxiety among the citizens of the CSFR, its absence must be weighed against the words and deeds of the original signatories to the Agreement since World War II, which overwhelmingly indicate that the agreement has been repudiated.

¹¹⁰ See MALAWER, *supra* note 77, at 100-01; Treaty Establishing Normal Relations Between The Two Countries, Dec. 11, 1973, Czech-F.R.G., 13 I.L.M. 19 [hereinafter Czech-F.R.G. Treaty].

¹¹¹ Czech-F.R.G. Treaty, *supra* note 110. See also MALAWER, *supra* note 77, at 101. The German government, despite the continual pleas of the Czechoslovak government, has staunchly refused to concede the Munich Agreement as void from its inception, arguing that to do so would create a legal quagmire for German courts with regard to civil acts such as marriage, divorce, inheritance, and land ownership which were contracted for under German law during the period from 1938-1945. *Id.*

¹¹² See MALAWER, *supra* note 77, at 101. The phrase "with regard to their *mutual relations*" was fought hard for by the German government during the negotiation of the Czech-F.R.G. Treaty. It was the FRG's position that tremendous legal complications with respect to German domestic law would arise if the treaty were to repudiate all acts of the German government between 1938 and 1945. The complications the FRG sought to avoid were "problems of inheritance, land ownership, status of marriages, and divorces and other civil acts contracted under German law" in the Sudetenland between 1938 and 1945. Consequently, the 1938 Munich agreement still has limited effect on legal acts pertaining to probate law and other civil contracts which effected only Sudeten Germans living in the Sudetenland during the Nazi occupation are still valid under current day German law. Any legal acts which occurred or contracts entered into between 1938 and 1945 which had any interstate effect between Germany and Czechoslovakia were rendered null and void by the 1973 Treaty. *Id.*

IV. ANALYSIS OF GERMANY'S LEGAL RIGHT TO COMPENSATION FOR THE CONFISCATION OF SUDETEN GERMAN PROPERTY FOLLOWING THE TRANSFER OF THE SUDETEN GERMAN POPULATION OUT OF CZECHOSLOVAKIA AFTER WORLD WAR II

Germany has no right to compensation or restitution for Sudeten German property confiscated by the Czechoslovak government at the end of World War II. States have expropriated property within their territorial jurisdiction for their own uses for thousands of years and even though such expropriations may be illegal under domestic or international law, a state certainly has, in the first instance, the power to do so.¹¹³ Furthermore, it is a maxim of international law that a state's actions with respect to its own national's property is purely a matter of municipal law regardless of the legality of the action and, *a fortiori*, property conflicts between states and their own nationals are not a proper subject of international law. Czechoslovakia issued a series of confiscation and denationalization decrees at the end of World War II which affected the Sudeten Germans. The actual sequence of those orders is critical to the determination of whether or not Germans who formerly lived in the Sudetenland have a claim for compensation under international law or whether the property which was taken from them is purely a matter of municipal Czech law.¹¹⁴ This determination, once made, however, does not end the inquiry.

There was a point in history when international law maintained a very conservative view which posited that "in all cases of property-taking 'adequate' compensation in the sense of 'full' compensation was required."¹¹⁵ The Czech claim, on the other hand, that Germany has no legal right to compensation is tarnished by the fact that the Czechoslovak confiscation decrees applied only to certain classifications of people based on race.¹¹⁶ And finally, any liability which the Czechoslovak state owes to Germany must necessarily be analyzed with regard to the international law of state succession, particularly in light of the twentieth

¹¹³ See WORTLEY, *supra* note 13, at 12.

¹¹⁴ Most of the Constitutions of the world's nations have provisions permitting them to exercise the power of eminent domain over property within their territorial sovereignty. This is a principle of law common to civilized nations. See, e.g., Grundgesetz [Constitution] art. 14 (1949) (F.R.G.); U.S. CONST. amend. V.

¹¹⁵ C.F. Amerasinghe, *Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice*, 41 INT'L & COMP. L.Q. 22, 23 (1992).

¹¹⁶ See PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 25-54 (1991). During the first half of the twentieth century, an international norm condemning racial and ethnic discrimination began to emerge. Witness the series of anti-discrimination treaties which accompanied the signing of the League of Nations Covenant. *Id.* at 41, 42.

century views on successor state liability and the recent inception of the Czech Republic.¹¹⁷

A. German Citizenship Law Under the Third Reich

The acquisition and loss of citizenship and nationality are determined by municipal law.¹¹⁸ Following the German invasion of Czechoslovakia on March 15, 1939, and the subsequent establishment of the German Protectorates of Bohemia and Moravia, Hitler issued decrees granting the Sudeten German inhabitants of the Protectorate full citizenship in the Reich; Czechs were only granted citizenship of the Protectorate.¹¹⁹ Under the Czechoslovak Constitution of 1920, which remained in force until the creation of Czechoslovak Socialist Republic in 1948,¹²⁰ citizenship was single and uniform for all inhabitants of the country regardless of nationality.¹²¹ Hitler's decree provided the Sudeten Germans of the Protectorate with dual Czech and German citizenship. The dual Czechoslovak-German citizenship status of the Sudeten Germans ended with the Czechoslovak denationalization decrees. The German Citizenship laws promulgated under the Third Reich affected all people of the Germanic race and were valid municipal laws which emanated from the legitimate German government.¹²²

¹¹⁷ On January 1, 1993, the CSFR split into two separate, independent states: The Czech Republic and Slovakia. See *Parting is Such Sweet Sorrow: As the Czechs and Slovaks Break Their Uneasy Federation In Two, the New Sovereign States May Find It Hard to Maintain Their Identities*, FIN. POST, Jan. 2, 1993, available in LEXIS, Nexis Library, World File.

¹¹⁸ See *Nottebohm Case*, 1955 I.C.J. 4; KELSEN, *supra* note 17, at 372.

¹¹⁹ See Edwards, *supra* note 73, at 665.

The Reich Protector was answerable only to Hitler and was given absolute control over all affairs of the protectorates. While some Czechs did remain in certain governmental positions, all positions of authority in the Protectorates were occupied by Germans. Other governmental organs of the Czechoslovak Republic remained in form. However, in practice they had no real authority. Thus, a parallel court system was set up for Germans by decree on September 1, 1939, whereby special German courts were created over the whole territory which had concurrent jurisdiction over Germans and Czechs. The Czech courts, on the other hand, had no jurisdiction over Germans. Thus, while German courts tried, convicted, and sentenced Czechs to death, no such jurisdiction vested in the Czech courts of the Protectorate. *Id.* at 660.

¹²⁰ See Radomir Luza, *Czechoslovakia Between Democracy and Communism, 1945-1948*, A HISTORY OF THE CZECHOSLOVAK REPUBLIC, 1981-84 387, 411-15 (Victor S. Mametay & Radomir Luza eds., 1973).

¹²¹ See Edwards, *supra* note 73, at 665 (quoting CZECHOSLOVAK CONSTITUTION, Feb. 29, 1920, art. 4).

¹²² See LICHTER & HOFFMANN, *supra* note 119.

B. *International Expropriation Law*

When the Czech government, led by Eduard Benes, returned from exile in 1945, it immediately issued a series of confiscation and denationalization decrees. The actual timing of the specific decrees is critical to the validity of Germany's present day claim for compensation on behalf of the Sudeten Germans who lost their property and were expelled from Czechoslovakia after World War II. A sovereign in international law has the right to regulate persons and property within its territory and this includes the right to take the property of nationals or foreigners with or without compensation, depending on the circumstances.¹²³ Generally a sovereign may only take property to enable it to deal with a sudden emergency or if such taking is for the public good.¹²⁴ The only recourse for an individual whose property has been taken by their sovereign is to pursue his claim through the domestic courts or other official organs of the taking sovereign.¹²⁵ A state's right to take the property of its own nationals within its territory creates no international law consequences. However, a state may protest on its own behalf or on behalf of its subjects, foreign legislation, or acts of foreign sovereigns which harm the property interests of its nationals.¹²⁶ "The protection of assets abroad [is] a routine function of diplomatic protection."¹²⁷ State takings which provide no compensation to the former owner are confiscations.¹²⁸ Confiscations are acceptable in international law when an act of confiscation is done in necessary self-defense, where the law of war is complied with, by way of capture in war, condemnation as prize, or as punishment for war crimes.¹²⁹

¹²³ See WORTLEY, *supra* note 13, at 23.

¹²⁴ See generally S. FRIEDMAN, *EXPROPRIATION IN INTERNATIONAL LAW* (1958); RICHARD T. ELY, *PROPERTY AND CONTRACT IN THEIR RELATION TO DISTRIBUTION OF WEALTH* 1 (1914); WORTLEY, *supra* note 13, at 29, 33.

¹²⁵ KELSEN, *supra* note 17, at 185 (The relationship of national law to individuals is a superior-inferior relationship. National law is supreme over the individual, thus, when a state takes property belonging to its own national, that national must pursue her claim through national courts.).

¹²⁶ See WORTLEY, *supra* note 13, at 72. See also *Mavrommatis Palestine Concessions*, (Gr. Brit. v. Greece), 1925 P.C.I.J. (ser. A), No. 5.

¹²⁷ See WORTLEY, *supra* note 13, at 72.

¹²⁸ "Confiscations effect an expropriation on terms that deliberately refuse any compensation; it is one means of exercising the police power." See WORTLEY, *supra* note 13, at 41.

¹²⁹ See *id.* at 41.

C. Czechoslovak Denationalization and Expropriation Decrees

1. The June 21, 1945 Confiscation Decree

The war officially ended in Czechoslovakia on May 8, 1945, when the German general in charge of the Prague garrison surrendered control of his troops. Shortly thereafter, the Benes government returned. The Sudeten Germans who were still in Czechoslovakia at the end of the war now found themselves in possession of dual citizenship.¹³⁰ One of the first acts of the Benes government upon its return from exile was the Decree of June 21, 1945, which provided that all farm land belonging to persons of German or Hungarian nationality¹³¹ was to be immediately confiscated without compensation.¹³² The only Germans and Hungarians who were exempt from this decree were those who actively participated in the fight against the Nazis for the liberation of Czechoslovakia.¹³³ The decree also applied to all traitors and enemies of the Republic, regardless of their nationality, particularly if they were

¹³⁰ Verordnung ueber den Erwerb der deutschen Staatsangehoerigkeit durch fruhere tschechoslowakische Staatsangehoerige deutscher Volkszugehoerigkeit vom 20 April 1930 RGBl. I S. 815) [Order on the Acquisition of German Nationality, April 20, 1930], reprinted in WERNER HOFFMANN, STAATSANGEHOERIGKEITSRECHT 428 (1966).

¹³¹ MODEEN, INTERNATIONAL PROTECTION OF NATIONAL MINORITIES IN EUROPE 20 (1969) ("Nationality presupposes more than common origin, and a language and culture distinct from that of other groups. It demands also that members of this group possess a feeling of national identity.").

¹³² See Edwards, *supra* note 73, at 671.

¹³³ See *id.* at 672. A system of People's Courts was created by law in order to prosecute and punish Nazi war criminals, traitors, and collaborators. The People's Courts were comprised of a presiding judge appointed by the President of the Republic and four laymen judges who were selected by the government from lists prepared by National Committees. See *id.* at 669. Membership on National Committees was principally made up of Czech and Slovak patriots who led the resistance against the Nazis during its occupation from 1938-45. See *id.* at 667. Consequently, those who sat on the People's Courts were not at all unbiased. The function of these courts was to deal quickly with collaborators and Nazi criminals. See *id.* at 669. The procedure in the People's Courts dealt with collaborators summarily and no appeal was permitted from their judgment. See *id.* at 669-70.

The "National Courts" were specially created to deal with members of the Protectorate government which was in power from 1938-45 and other high level collaborators. Its procedures were similar to those of the People's Courts. While most Czechs and Slovaks believed the courts functioned effectively, many others criticized their procedures. See C.L. Salzberger, *Czechs Back Again to Judicial Trials — Post-War People's Courts and Summary Justice End — Detentions Limited*, N.Y. TIMES, May 7, 1947, at A16.

The decision as to who was German or Hungarian rested with the National Committees and was subject to appeal to the Ministry of Agriculture and ultimately to the Supreme Administrative Court. See Edwards, *supra* note 73, at 672.

hostile to the cause for Czech liberation during the occupation.¹³⁴ Lastly, this decree "applied to all societies and corporations whose management willingly and deliberately served the German war machine or Nazism, and Fascism in general."¹³⁵ Since the Sudeten Germans possessed dual German and Czechoslovak nationality at the time the June 21, 1945 decree was promulgated, the confiscation decrees of the Czechoslovak government did not give rise to any international claim in accordance with Article 4 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws.¹³⁶ Czechoslovakia was free to confiscate the farm land of the Sudeten Germans under international law despite the fact that the Sudeten Germans were also German nationals because they still retained their Czechoslovak citizenship and as such were still bound by the laws of Czechoslovakia based on Czechoslovakia's national jurisdiction.¹³⁷ Consequently, in accordance with Article 4 of the Hague Convention the Czechoslovak government's confiscation of Sudeten German land involved no violation of international law.¹³⁸ As sweeping as the Farm Decree of June 21, 1945 was, Czechoslovakia's confiscation of farm land without compensation was well within its sovereign power.¹³⁹

2. The August 2, 1945 Denationalization Decree

Confiscation decrees issued after the official denationalization decrees left the Sudeten Germans as citizens of Germany. Therefore, the Czechoslovak confiscation decrees issued after the denationalization decrees gave rise to an international legal conflict between Germany and Czechoslovakia which still has not been resolved to this day.¹⁴⁰ The Sudeten Germans were officially denationalized by the Czechoslovak

¹³⁴ See *id.*

¹³⁵ "All those who in the 1929 census declared themselves to be Germans or Hungarians were to be considered Germans or Hungarians respectively, as well as all those who joined a German or Hungarian political party or other organization. During the war some persons among the Czechs declared themselves to be German, usually for interested motives, though before the war they had declared themselves Czechs." *Id.* at 672 n.89.

¹³⁶ See Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, Apr. 12, 1930, art. 4, 179 L.N.T.S. 89 [hereinafter Hague Convention].

¹³⁷ See GREIG, *supra* note 11, at 386. ("Subject to limited exceptions created by treaty, no state has a right to object to the way in which another state treats its own nationals.").

¹³⁸ See Hague Convention, *supra* note 136. See also *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4.

¹³⁹ See WORTLEY, *supra* note 13.

¹⁴⁰ *Klaus Dismisses Claims of Sudeten Party*, CTK National News Wire, Jan. 11, 1993, available in LEXIS, News Library, Curnws File.

government on August 2, 1945.¹⁴¹ Decree No. 33 declared that inhabitants of the Czechoslovak Republic of German or Hungarian descent were no longer Czechoslovak citizens.¹⁴² The law did, however, provide Germans and Hungarians the opportunity to regain their property if they could show that they had remained faithful to the Czechoslovak state by proving that they had "never committed any crime against the Czech or Slovak nations, and either actively participated in the fight for liberation or suffered from Nazi terror."¹⁴³ Germans and Hungarians whose applications were refused were compelled to leave Czechoslovakia.¹⁴⁴ It is important to note that the Germans who were forced to leave pursuant to Czechoslovak law and the Potsdam Protocols were not rendered stateless — a condition which is viewed with opprobrium in international law.¹⁴⁵

The Sudeten Germans all became citizens of Germany when Hitler's armies invaded and occupied the country. When they were divested of their Czechoslovak citizenship, they lost their dual citizenship and simply became citizens of Germany.¹⁴⁶ The Czechoslovak Denationalization Decree of August 2, 1945, is critical to Germany's present claims for compensation because it rendered the Sudeten Germans still in Czechoslovak territory aliens in possession of German nationality. Consequently, actions taken after the Denationalization Decrees by the Czechoslovak Republic with respect to the Sudeten Germans took on an international legal dimension involving the state of Czechoslovakia and the state of Germany which, although occupied at the time, remained a passive subject of international law.¹⁴⁷

3. The October 25, 1945 Confiscation Decree

Germany may have a valid claim on behalf of the Sudeten Germans now living in Germany for property confiscated from them after the Denationalization Decree of August 2, 1945. The Czechoslovak government issued Presidential Decree No. 108 on October 25, 1945, which provided in part:

¹⁴¹ See Edwards, *supra* note 73, at 665.

¹⁴² See *id.* at 665.

¹⁴³ See *id.* at 665-66.

¹⁴⁴ See *id.* at 665.

¹⁴⁵ See WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 168 (1979).

¹⁴⁶ THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW WITH A TRANSLATION OF THE BASIC LAW (Ulrich Karpen ed., 1988).

¹⁴⁷ See Wladyslaw Czapinski, *The New Polish-German Treaties and the Changing Political Structure of Europe*, 86 AM. U. J. INT'L L. & POL'Y 163, 164 (1992).

all movable and immovable property belonging to persons and institutions hostile to the Czechoslovak Republic are to be confiscated. Personal belongings like clothes, bedding, food, utensils, etc., as well as tools necessary for working purposes, are not to be confiscated. All Germans who wish to keep their property must give sufficient proof that they remained loyal to Czechoslovakia.¹⁴⁸

This confiscation decree, which dealt with all property which was not confiscated as farm land pursuant to the June 21, 1945 decree, occurred after the denationalization of the Sudeten Germans on August 2, 1945, was an illegal expropriation of German property and, therefore, gave rise to a derivative claim for damages which Germany could pursue against the state of Czechoslovakia under international law.¹⁴⁹ The agricultural property confiscated in June of 1945, did not violate international law since those decrees involved only the state of Czechoslovakia and its own subjects, the Sudeten Germans, who also happened to be citizens of Germany.¹⁵⁰ Therefore, the only Czechoslovak actions which violated international law were those confiscations which occurred pursuant to the October 25, 1945 decree and thereafter and, therefore, these confiscations are the only ones which Germany may now pursue against the CSFR.

D. Analysis of the Czechoslovak Confiscation and Denationalization Decrees Under International Law

The Czechoslovak Confiscation Decree of October 25, 1945 violated standards of international law.¹⁵¹ In international law the "lack of a remedy by treaty or by the *lex situs*"¹⁵² does not prevent a claim for restitution in international law."¹⁵³ State takings which provide no compensation to the former owner are confiscations.¹⁵⁴ When a state con-

¹⁴⁸ Edwards, *supra* note 73, at 673.

¹⁴⁹ Mavrommatis Palestine Concessions, 1925 P.C.I.J. (ser. A) No.5.

¹⁵⁰ See WORTLEY, *supra* note 12. The regulation of property rights has always been a matter of municipal law. Furthermore, since the Sudeten Germans living in Czechoslovakia at the conclusion of World War II possessed both Czechoslovak and German citizenship, no international dispute arose since Czechoslovakia was free to regulate the property rights of its own citizens, which the Sudeten Germans were. See Hague Convention, *supra* note 136. See also HOFFMAN, *supra* note 130 (discussing the 1938 German citizenship law promulgated by the German government).

¹⁵¹ See WORTLEY, *supra* note 12, at 39.

¹⁵² See Edwards, *supra* note 73, at 673. See also Ust. Zak C.S.F.R. [Federal Constitution of 1920], art 109, para. 2 (Czech.) (The 1920 Czechoslovak Constitution permitted expropriation without compensation where a law, passed in accordance to constitutional methods, so provides.).

¹⁵³ See WORTLEY, *supra* note 12, at 93.

¹⁵⁴ See *id.* at 41 ("Confiscations effect an expropriation on terms that deliberately refuse any

fiscates property of foreign nationals it must justify its confiscation by showing that it adhered to the normal standards then in acceptance in the international community.¹⁵⁵ Confiscation not in conformity with such standards may give rise to a remedy under international law.¹⁵⁶ Examples of confiscations which are justifiable under international law include those permitted in cases of war, the suppression of piracy, or by special treaty.¹⁵⁷ Additional confiscations acceptable in international law include an act of confiscation done in necessary self-defense, where the law of war is complied with, by way of capture in war, or as punishment for war crimes.¹⁵⁸ When a state confiscates property in the above-mentioned contexts, it is acting in accordance with international law. However, if a state abuses its sovereign power in the process of confiscating foreign property, such abuse may give the state whose citizenship the foreigner possesses a claim for restitution.¹⁵⁹ "The abuse of a right, however, cannot be presumed and the onus of proof is upon the party which alleges that there has been an abuse of right."¹⁶⁰ It is for this reason that every confiscating state must be prepared to justify any confiscation of foreign property in light of current international standards.

The war was over before the October 25, 1945 confiscation decree, the piracy exception is inapplicable, and no special treaty was in force between the two countries. Arguably, the confiscation decrees amounted to punitive measures against the Sudeten Germans who collaborated with the Nazis so as to fall under the war crimes exception. However, the justification for the war crimes exception to confiscations was not borne out as illustrated by the Paris Conference on Reparations which regarded confiscated Sudeten German property as Czechoslovakian property and, therefore, not chargeable to the Czechoslovakian reparations account.¹⁶¹ On an emotional level, Czechoslovakia's confiscation of Sudeten German property at the end of World War II is understandable — the Nazis, with substantial assistance from the Sudeten German population conducted a brutal seven-year campaign of terror in order to "Germanize" the Czech people.¹⁶² Nevertheless, the October 25, 1945 confiscation de-

compensation; it is one means of exercising the police power.").

¹⁵⁵ See *id.* at 38.

¹⁵⁶ See *id.*

¹⁵⁷ See *id.* at 103.

¹⁵⁸ See *id.* at 41.

¹⁵⁹ See *id.* at 76 (explaining that if restitution in kind is impossible [which it usually is] then compensation is acceptable).

¹⁶⁰ See *id.* at 103.

¹⁶¹ See LUZA, *supra* note 4, at 272 n.24. See also Czaplinski, *supra* note 147, at 172.

¹⁶² VOJTECH MASTNY, *THE CZECHS UNDER NAZI RULE* 123-29 (1971).

cree violated international law as it was not pursuant to any of the generally recognized justifications for confiscation under international law.¹⁶³

Confiscation of foreign property which violates internationally recognized justifications is a violation of international law. The traditional view in international law provided that "the acceptance of the expropriation of foreign property is conditional upon the obligation to make 'adequate, effective and prompt compensation.'"¹⁶⁴ However, in recent years, states, jurists, and writers have been unable to settle on a uniform rule with respect to what constitutes "adequate, effective and prompt compensation."¹⁶⁵ Still, the sheer number of out-of-court lump sum settlement agreements since World War II indicates that states recognize an obligation to compensate individuals for expropriated property.¹⁶⁶ Moreover, Czechoslovakia is currently in the process of satisfying restitution claims dating back to the 1948 Communist expropriations.¹⁶⁷

Looking at the confiscation and denationalization decrees of the Czechoslovak government after World War II, several treaties, including the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, The Paris Conference on Reparations, and the Three Power Agreement in 1952,¹⁶⁸ indicate a possible justification for Germany's current demands for compensation. The Sudeten German property taken pursuant to the October 25, 1945 decree was taken in violation of international law because it confiscated property of the Sudeten Germans who were no longer Czechoslovak-German dual nationals, but only German nationals. The October 25, 1945 decree confiscated foreign property without compensation and consequently gave Germany a claim for damages in international law for harm done to the

¹⁶³ See WORTLEY, *supra* note 12.

¹⁶⁴ Anglo-Iranian Oil Co. Case (U.K. v. Iran), 1952 I.C.J. 62. See also WORTLEY, *supra* note 12, at 33-36.

¹⁶⁵ C.F. Amerasinghe, *Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice*, 41 INT'L & COMP. L.Q. 22, 23 n.10 (1992).

¹⁶⁶ Richard B. Lillich & Burns H. Weston, *Lump Sum Agreements: Their Continuing Contribution to the Law of International Claims*, 82 AM. U. J. INT'L L. & POL'Y 69 (1988). See, e.g., Agreement Concerning Compensation for Certain Danish Interests in Hungary Not Covered by the Agreement of 18 June 1965, Mar. 18, 1971, Den-Hung., 797 U.N.T.S. 364; Agreement Between Canada and the Czechoslovak Socialist Republic, Apr. 13, 1973, Can.-Czech., 1973 Can. T.S. No.24; United States-Peru Agreement of Feb. 19, 1974, 25 U.S.T. 227; United States-Egypt Agreement of May 1, 1976, 4 U.S.T. 4214.

¹⁶⁷ *Expulsion of Germans Marked Beginning of Communism — Havel*, CTK National News Wire, Mar. 1, 1992, available in LEXIS, Nexis Library, World File. See also Jeffrey J. Renzulli, Comment, 15 B.C. INT'L & COMP. L. REV. 165 (1992).

¹⁶⁸ Convention on Relations Between the Three Powers and the Federal Republic of Germany, May 26, 1952, 6 U.S.T. 4251.

property of its nationals.

While Germany may have a *de jure* claim for damages done to Sudeten property confiscated at the end of World War II, (at least with respect to those Sudeten Germans who were unable or were not permitted to adequately prove their loyalty before the National Courts or the Peoples Courts¹⁶⁹) from a *de facto* point of view, they do not. The entire world recognized and acquiesced in the minority transfers arising out of the Potsdam Protocols as an appropriate solution to the tensions and conflict the German minority populations in Czechoslovakia and elsewhere in central and eastern Europe created.¹⁷⁰ Additionally, the conclusion of World War II was a unique moment in international relations with respect to the efforts made by nation states to ensure that another world wide conflict would not break out. It is beyond dispute that a similar transfer of minority populations today would violate the provisions of the 1948 U.N. Universal Declaration on Human Rights,¹⁷¹ and the 1963 U.N. Declaration on the Elimination of All Forms of Racial Discrimination.¹⁷² Numerous minority treaties were signed by many states at the inception of the League of Nations, including the St. Germain Treaty¹⁷³ which protected the rights of German minorities in Czechoslovakia. Many other minority treaties were also signed in the nineteenth and early twentieth centuries in addition to the existence of provisions protecting minorities found in the constitutions of many nation states.¹⁷⁴ Notwithstanding these minority treaties, no clear custom or practice existed in the world in 1945 which gave a state a claim based on the violation of a particular minority's human rights.¹⁷⁵ "The [post-World War II world] started, as it were, with a *tabula rasa* in the matter of tolerance and encouragement of minorities."¹⁷⁶ States could act as they pleased in relation to their populations if they were not inhibited by a relevant treaty."¹⁷⁷

¹⁶⁹ See Edwards, *supra* note 73, at 664-65.

¹⁷⁰ See INIS L. CLAUDE, NATIONAL MINORITIES: AN INTERNATIONAL PROBLEM 116 (1955).

¹⁷¹ See *International Bill of Human Rights & Universal Declaration of Human Rights*, G.A. Res. 217 (III) (A), U.N. Doc. A/810 (1948).

¹⁷² U.N. Declaration on the Elimination of all Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195.

¹⁷³ See LUZA, *supra* note 4, at 34.

¹⁷⁴ See PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES (1991).

¹⁷⁵ MODEEN, *supra* note 131, at 67.

¹⁷⁶ THORNBERRY, *supra* note 174, at 113. See also Study of the Legal Validity of the Undertakings Concerning Minorities, UN Doc E/CN.4/367.

¹⁷⁷ THORNBERRY, *supra* note 174, at 113.

E. German Claims to Land Confiscated from Sudeten Germans in Czechoslovakia are Barred by Prescription¹⁷⁸ and Historical Consolidation¹⁷⁹

The Czechs have exercised sovereign control over the regions of Bohemia and Moravia since 1919. Except for the seven years between 1938 and 1945, Czechs have exercised dominion over these territories through the Benes government during the periods 1919 to 1938 and 1945 to 1948, the Communists from 1948 to 1989, the CSFR from 1989 to 1993 and now the independent Czech Republic. Even during the Nazi occupation of Czechoslovakia from 1938 to 1945, Edvard Benes remained the legitimate representative of the Czechoslovak state while in exile in London.¹⁸⁰ Furthermore, the historical claim of the Czechs and Slovaks to the regions of Bohemia and Moravia is even more compelling than the claims asserted by the Sudeten Germans. Bohemia and Moravia were populated exclusively by the Slavic ancestors of the Czechs and Slovaks beginning in the fifth century until the twelfth.¹⁸¹ The historical claim of the Germans to these regions is further weakened by the fact that the historic homeland of the German people is and was primarily the area in Central Europe now known as the Federal Republic of Germany. Germans emigrated to Bohemia and Moravia at a time when Czechs and Slovaks were already there.

¹⁷⁸ According to Greig:

Even if a particular land area is under the dominion of one state, it does not follow that the taking possession of that area by another cannot create a new title. Whereas occupation applies to a territory which is a *res nullius* [property owned by no one], prescription applies a similar line of reasoning to territory that did have a sovereign. A combination of the passage of time and the implied acquiescence of the dispossessed sovereign are the basis of prescriptive rights. The underlying principle is that a state which has "slept upon its rights" should not be allowed to revive them against a state that has been in constant and long continued enjoyment of those rights.

GREIG, *supra* note 11, at 163. See also *Arkansas v. Tennessee*, 310 U.S. 563 (1940).

¹⁷⁹ DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 200-01 (Eng. trans.), quoted in GREIG, *supra* note 11, at 167 ("[Historical] consolidation differs from acquisitive prescription . . . in the fact that it can apply to territories that could not be proved to have belonged to another State. It differs from occupation in that it can be admitted in relation to certain parts of the sea as well as of land. Finally, it is distinguished from international recognition . . . by the fact that it can be held to be accomplished . . . by a sufficiently prolonged absence of opposition either, in the case of land, on the part of states interested in disputing possession or, in maritime waters, on the part of the generality of States.").

¹⁸⁰ See Edward Taborsky, *Politics in Exile, 1939-1945*, in A HISTORY OF THE CZECHOSLOVAK REPUBLIC 1918-1948 322 (Victor S. Mamatey & Rudimir Luza eds., 1973).

¹⁸¹ See LUZA, *supra* note 4.

The Czech claim to property confiscated from the Sudeten Germans without compensation or restitution in 1945 is superior to current Sudeten German claims for compensation and restitution under the international law doctrine of acquisitive prescription. International law does not lay down precise rules regarding the acquisition of prescriptive rights.¹⁸² All that is required by international law is that a sovereign must possess a piece of territory as a sovereign.¹⁸³ Perhaps the clearest legal principle on the subject of prescriptive acquisition was posited by the arbitrators in the *Grisnadarna Case*, who said that "a state of things which actually exists and has existed for a long time should be changed as little as possible."¹⁸⁴

The Czechs and Slovaks have lived in the regions of Bohemia and Moravia since the fifth century. They have lived under self-rule from 1919 to 1993 except for the Nazi occupation from 1939 to 1945. One of the underlying reasons for prescription in international law in addition to discouraging countries from "sleeping on their rights" is to bar stale claims from being brought against a country which has been in constant and long-continued enjoyment of those rights. Since 1945, Czechs have occupied Bohemia and Moravia constantly and continuously in addition to their historical claims dating back to the fifth century.

Many Germans who lost property under the confiscation decrees are now either dead or very old. Certainly their recollections as to exactly what property is at issue, either real or personal, are beginning to fade. Furthermore, Germans who were expelled from Czechoslovakia pursuant to the Postdam Protocols were given an opportunity pursuant to Czechoslovak law to prove that they were not disloyal to the Czechoslovak state following the denationalization and confiscation decrees.¹⁸⁵ The actions and statements of successive German governments representing the Federal Republic of Germany further strengthen the Czech Republic's current position with respect to its refusal to compensate Sudeten Germans for property confiscated after World War II. German Governments since World War II have repeatedly renounced any claims to German property which Germany formerly asserted under the now repudiated Munich Agreement culminating in the Czechoslovak-German Treaty of 1973.¹⁸⁶

Not only has Germany renounced all state claims to Bohemia and Moravia under the Munich Agreement, but its diplomatic protests have

¹⁸² See GREIG, *supra* note 11, at 164.

¹⁸³ See *id.*

¹⁸⁴ See *id.* (citing *Grisnadarna Case*, 1 HAGUE CT. REP. (SCOTT) 130 (1909)).

¹⁸⁵ See Edwards, *supra* note 73.

¹⁸⁶ See BENNET & NICHOLLS, *supra* note 3.

been insufficient to preserve any claim it may have had to lands belonging to Sudeten Germans.¹⁸⁷ Germany's claim would have been assisted, over the years, had it raised the dispute before the U.N. or "by a bona fide suggestion that the dispute should be submitted to arbitration or judicial settlement."¹⁸⁸ The fact that Germany has not effectively protested its claims for restitution and compensation through diplomatic channels lends credence to the view that it simply cannot make out a superior claim as required by international law¹⁸⁹ and that the Czech Republic's current refusal to pay compensation or undertake restitution is in accordance with the international legal principle of historic consolidation.

The current Czech refusal to compensate or restitute Sudeten Germans whose property was confiscated and who were expelled from Czechoslovakia at the end of World War II finds its most compelling legal support in the international legal doctrine of historical consolidation. Historical consolidation, while a form of prescription, does not suffer "from the restrictions that apply to other modes of acquisition that might be applied in similar situations."¹⁹⁰ Oppenheim, "after pointing out that international law recognized prescription, however unlawful its origin, defined [prescription] in its widest terms as 'the acquisition of sovereignty over a territory through continuous and undisturbed exercise over it during such a period as is necessary to create sovereignty under

¹⁸⁷ See GREIG, *supra* note 11, at 163 (discussing the Chamizal Arbitration (U.S. v. Mex.). According to the arbitrators in that case which involved a U.S. claim to a piece of Mexican Territory along the Rio Grande, what is required in order to effectively protest another country's possession of a disputed piece of territory is more than a protest for "form's sake." What seems to be required is something that shows the protesting state "means business." Thus, in the Chamizal Arbitration, Mexico not only protested the U.S.'s claim to territory diplomatically, but also brought enough diplomatic pressure to bear on the U.S. so that the U.S. eventually signed a convention, formally acknowledging that a dispute over the given territory existed between the two countries).

The Sudetendeutsche Landsmannschaft, the principle group which represents the Sudeten Germans' claims continues to demand *recognition of the right to the former homeland and to confiscated property*. See *New Talks on Sudeten German Issues Will Be Necessary - Spokesman*, CTK National News Wire, Sept. 1, 1992, available in LEXIS, Nexis Library, World File (emphasis added).

Czechoslovakia has never formally acknowledged that a dispute over restitution or compensation exists and the Czech Republic continues to adhere to this position today. See *Czech Premier Rejects Possible Sudeten German Claims*, CTK National News Wire, Feb. 5, 1993, available in LEXIS, Nexis Library, World File.

¹⁸⁸ *Minquier and Ecrehos Case* (Fr. v. U.K.), 1953 I.C.J. 47. (separate opinion of Judge Carneiro).

¹⁸⁹ See *The Eastern Greenland Case* (Denmark v. Norway), 1933 P.C.I.J. (ser. A/B) No. 53.

¹⁹⁰ GREIG, *supra* note 11, at 166. See also *The Fisheries Case* (U.K. v. Norway), 1951 I.C.J. 116, 138.

the influence of historical development the general conviction that the present condition of things is in conformity with international order."¹⁹¹ Greig further points out that "there will come a time when there will be created a general conviction that however wrongful the original taking, or whatever protests have been made, the present condition of things should not be disturbed."¹⁹²

Forty-eight years have passed since the Sudeten Germans were transferred out of Czechoslovakia pursuant to the Potsdam Protocols. During that time the actions taken and not taken by the Federal Republic of Germany with respect to compensation and restitution claims indicate that Sudeten German claims for restitution or compensation are no longer viable. The FRG has renounced all claims under the Munich Agreement; it has not effectively asserted its claim in accordance with international standards;¹⁹³ and finally, there is most definitely a "general conviction that the present condition of things is in conformity with international order."¹⁹⁴ Moreover, in accordance with the current status of state succession law, the Czech Republic is not obligated to pay compensation or provide restitution for land confiscated under the Benes decrees in 1945.

F. No Settled Custom or Practice Exists with Respect to State Succession to Obligations of Predecessor States

Under current standards of international state succession law, the Czech Republic is not obligated to compensate Germany for harm done to the Sudeten Germans whose property was illegally confiscated pursuant to the October 25, 1945 confiscation decrees. A successor state is one which has sovereignty over a territory and a populace which was previously under the sovereignty of another state.¹⁹⁵ In the last fifty years the law of state succession has become increasingly conflicted and uncertain.¹⁹⁶ After World War II, many new states came into existence.¹⁹⁷ The 1960's brought a wave of decolonization which further added uncertainty to a shifting area of international law.¹⁹⁸ The univer-

¹⁹¹ See GREIG, *supra* note 11, at 166.

¹⁹² See *id.* at 166.

¹⁹³ See GREIG, *supra* note 11, at 187.

¹⁹⁴ *Id.*

¹⁹⁵ See Alfred Cowger, Note, *Rights and Obligations of Successor States: An Alternative Theory*, 17 CASE W. RES. J. INT'L L. 285, 286 (1985); See also D.P. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW & INTERNATIONAL LAW 3, (1967).

¹⁹⁶ See *id.*

¹⁹⁷ United Nations, Materials on Succession of States 3, U.N. Doc. ST/LEG/SER.B/14 (1967).

¹⁹⁸ *Id.*

sal succession theory is one of the earliest theories of state succession and dates back to Roman times.¹⁹⁹ It posits that the state as a "personality unto itself always passes all rights and obligations to its successor" in all instances.²⁰⁰ This theory was founded on two premises: 1) the state received all its powers from god and nature "so that any change in government does not change the omnipotent origins of the state;"²⁰¹ and 2) the personality of the state contains the essential characteristic of a citizenry which, though it may change, is still an ever-present factor in any state.²⁰² The premises upon which universal succession were based gradually crumbled; the theory that the state's origins are somehow divine was rejected and the fact that internal governments often changed, while the state itself stayed intact, led to the development of the partial succession theory. The theory of partial succession depended on whether or not the personality of a predecessor state remained in the successor state.²⁰³

Another theory of state succession postulated that obligations do not pass to successor states, but rights do.²⁰⁴ This theory was based on contract theory and the fundamental principle that when a new legal order comes into existence in the form of a new state, the new state was a third party to any obligations of the predecessor state and was, therefore, not bound.²⁰⁵

The views held by states today regarding state succession are as varied as the views put forth by past succession theorists. Perhaps one of the most important historical events whose powerful international legal implications for state succession still remain was the Bolshevik Revolution in the former Soviet Union. According to the Soviet theory of state succession, the Communist revolution brought about such a fundamental change that states could not view it as a mere internal reform.²⁰⁶ The Soviets argued that the goal of the revolution was to totally transform society and that in order to do so, all existing institutions of government and property had to be completely destroyed.²⁰⁷ To impose successor obligations on such a revolutionary state would in-

¹⁹⁹ See HERBERT A. WILKINSON, *THE AMERICAN DOCTRINE OF STATE SUCCESSION* 13 (1934).

²⁰⁰ *Id.*

²⁰¹ 1 D.P. O'CONNELL, *STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW* 9-10 (1967).

²⁰² GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 310-11 (F. Kelsey trans. 1925).

²⁰³ See Cowger, *supra* note 195, at 287.

²⁰⁴ See A.B. KEITH, *THE THEORY OF STATE SUCCESSION WITH SPECIAL REFERENCE TO ENGLISH AND COLONIAL LAW* (1907).

²⁰⁵ WILKINSON, *supra* note 199, at 14.

²⁰⁶ See Cowger, *supra* note 195, at 294.

²⁰⁷ See MARY McCAULEY, *POLITICS AND THE SOVIET UNION* 57 (1981).

fringe upon the sovereignty of the state to transform itself.²⁰⁸ The socialist view of state succession theory was accepted by many socialist governments which rose to power after World War II, including Czechoslovakia.²⁰⁹

Although the actions of the Czechoslovak government at the end of World War II violated international law and gave rise to a German claim for damages, the Czech Republic did not succeed to any of the obligations which were created by the Benes government which was in power from 1945-48. The first question which must be asked with respect to any state succession is whether a new state exists or whether there has merely been a change in governments. Under the traditional definition of statehood, "[t]he state as a person of international law should possess the following qualifications: (a) a permanent population; (b) defined territory; (c) a government; and (d) capacity to enter into relations with other states."²¹⁰ Traditional indicia that a new state has come into being include a change in population²¹¹ and a change in territory.²¹² The Czech Republic is a new state which was once part of a country whose total area was almost twice that of the Czech Republic's. Additionally, whereas the Czechs were once a part of Czechoslovakia, the population of the Czech Republic is half of what Czechoslovakia's was. Thus, the Czech Republic meets the definition of what constitutes a new state by the most conservative and traditional measures.

Furthermore, as a new state, the Czech Republic's current efforts to transform itself from a socialist society with a command economy, to a democracy with a free market system are objectives no less fundamental and sweeping than the objectives sought to be realized by all of the socialist states in this century. There is no settled custom or practice regarding state succession in the international legal system, particularly in light of the socialist view of state succession put forth in this century, that a socialist successor state, in trying to totally transform society succeeds to none of the obligations incurred by its predecessor state. Consequently, since there is neither a treaty nor a clear legal principle which requires the Czech Republic to compensate the Sudeten Germans for property confiscated pursuant to the October 25, 1945 decree, the Czech Republic is under no international obligation to pay any compen-

²⁰⁸ See *id.*

²⁰⁹ See GREIG, *supra* note 11, at 613.

²¹⁰ Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 165 L.N.T.S. 19.

²¹¹ See GROTIUS, *supra* note 202, at 315.

²¹² STATE SUCCESSION, 2 WHITEMAN DIGEST, § 1, at 764 (1963).

sation to Germany.²¹³ Questions may be raised as to why the CSFR was reviewing restitution claims for property nationalized by the Communists.²¹⁴ The answer, quite simply, is that the CSFR chose to do so not due to legal compulsion, but for political and economic reasons.²¹⁵

G. Conclusion

The Czechs and Germans have had long and stormy coexistence which dates back centuries. Relations between Czechs and Germans probably reached their nadir beginning in 1938 with the annexation of the Sudetenland and ending with the transfer of the Sudeten Germans out of Czechoslovakia at the conclusion of World War II. The actual sequence of the August 2, 1945 denationalization decree and the subsequent confiscation decree of October 25, 1945 violated international law. This violation of international law notwithstanding, the Czech Republic has no legal obligation to compensate Germany for damage done to Sudeten German property in Czechoslovakia after World War II under current standards of international state succession and prescription law.

²¹³ Case of the S.S. Lotus (Fr. v. Turk.) 1927 P.C.I.J. Ser. A. NO. 10 (Absent a convention or established custom "[r]estrictions upon the independence of states cannot . . . be presumed.").

²¹⁴ "We are restituting property going back to February 25, 1948, that is, the wrongs of Communism, and many reasons we will not go any deeper into the past." *Expulsion of Germans Marked Beginning of Communism* — Havel, CTK National News Wire, April 16, 1992, available in LEXIS, Nexis Library, World File.

²¹⁵ See Jeffrey J. Renzulli, Comment, 15 B.C. INT'L & COMP. L. REV. 165 (1992).

Additionally, the CSFR was a sovereign state as is the new Czech Republic. As sovereign states they have voluntarily chosen to pay restitution for certain expropriations of the former Communist government. This is being done to quiet title to land and chattels which foreigners want to invest in but are reluctant to do so for fear of not getting a clear title. By recognizing these restitutionary claims, neither the CSFR nor the Czech Republic is recognizing any legal obligations as a successor state. They are merely trying to calm investor apprehension in order to promote the investment needed to get a market economy running. Parallels may be drawn to the U.S.S.R.'s action in *United States v. Pink*, 315 U.S. 203 (1942), where the U.S.S.R. paid money to the United States in order to resolve tensions between the two countries by settling claims of United States nationals against the Soviet Union in the wake of widespread nationalizations. See *id.* at 227-32. The U.S.S.R. acted in order to encourage the United States to formally recognize the U.S.S.R. — not because it felt legally obligated to compensate United States nationals. See *id.*